

Mr. EMMERTONS
MARRIAGE
WITH
Mrs. BRIDGET HYDE
CONSIDERED.

Wherein is discoursed the Rights and Nature
of Marriage.

What Authority the *Curia Christianitatis* hath in
Matrimonial Causes at this day.

The Levitical Degrees, the Bounds of a Legal Marriage,
and the Reasons thereof.

And that now Matrimonial Causes are determinable
by Virtue of the Statute of *H. 8.* by the Judges of
Common Law.

In a Letter from a Gentleman in the Country to one
of the Commissioners Delegates in that Cause, de-
siring his Opinion therein.

Τὸ βλῆπεν γυνόμενον νόμῳ.
ἔγω ἀπαρβῶ. Marc. Antonin.

LONDON,

Printed for the Authour, and Published by
Richard Baldwin. 1682.

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Mr. EMMERTON'S
MARRIAGE
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SIR,

I Received your Letter, wherein you were pleased to consult me, and to desire my thoughts how a Judge in the Cause of Mr. *Emmerton's* Marriage to Mrs. *Bridget Hyde* now depending, before the Commissioners of Delegates, ought to guide himself. And what Opinion I have of the Authority of such Commissioners: And to resolve you how Matrimonial Causes came to be thus split and the same cause in several respects of several Consuance. The Question of Right Cognoscible in the *Curia Christianitatis*; But the Question of Fact in our Common Law Courts: How this inconvenience and irregularity came about, and whether it be not remedied by the Stat. of H. 8. which prohibits Marriages to be Impeached that are contracted by Persons not within the Levitical degrees of Kindred. By that Statute the Laws of *Moses* to the *Jews*, is become a Statute Law of *England*; and the interposing of the Church her Authority, in defining within

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what degrees Marriages can be lawfully made, are discharged. The Canons of the Church have always given the Rule to all Christendome in these Matters, Matrimonial Causes are conducted every where by the Canon Law where it is not controld by the Sovereign Law of the State. As the Civil Law doth govern in most Countries, in all Cases where no municipal Laws or local Customs do intervene: what the Roman Civil Law hath Establish'd, is not the measure of Matrimonial Causes, but the Canon Law or Councils of the Church, which is not so in any other Causes refer'd by our Constitutions to the Civil Law Courts.

You likewise desire my Opinion about the Levitical degrees, and for what reason Marriages within these degrees are forbidden, and whether we ought to stand within the Letter of that Law of *Moses*, and the prohibited instances, and not take Cases under aparity of Reason to be likewise prohibited: Whether our Common Law Courts are not competent to understand and Interpret a Chapter of *Leviticus* and a Law of *Moses* as well as any other Writing, or as our own Statute Laws. And consequently the Authority of the Church precluded in judging any longer about the lawfulness or unlawfulness of Marriages in respect of the degrees of Kindred: which you think was the only reason that the Church interposed in Matrimonial Causes: which were certainly before the Statute of H. 8. within their Province. And that duly, for that they had been from the first publishing of our Religion, accounted of a Religious consideration, and were declar'd by the Laws, and the Spirit, and Purity of our Religion; and those matters were rightly and fitly conducted by the guides of our Religion. Sir

in Sir, as soon as I read your Commands, I applyed my self, all other matters, but necessary avocations neglected, to give you such a return as I could, not considering my own great insufficiency to resolutions in matter of such high moment, but considering, that you desired what I could, not, what I could not say in the matter. But in what I fall short of your expectation, you must impute it to the very short time you allotted me, a peremptory day for this cause being very near, and what I shall after that time offer, may be like advice administered to a departing man.

But that which did most discourage me in this undertaking, was want of particular notice of the Cause, you having supply'd to me but some Generals, and given me onely the complexion of the Cause, and not given it me, represented in all its lineaments and parts, nor furnished me any of those niceties that have perplexed the Cause, nor those Arts which have given it all this delay; by which the iniquity of a pretence may be discerned, and the zeal of a Righteous man may be provok'd and excited. But tho you have not troubled your self with a prolix account of those matters for the sparing my trouble, I am pleas'd that you are not without a just resentment of them, and they will be only considered by you when you come to form your Judgment, for I understand by you that you were not at the last Session in this Cause, being detain'd by very weighty affairs of your own, and presuming (as you say) that you could not imagine, that a Cause of that clearness, a Matrimonial Cause, a Cause of any other to be highly favour'd, a Cause that would not suffer any longer delay. The mischeifs and the sin of those delays becoming every day more crying and clamorous,

morous, could not but find a ready Sentence from worthy men that are touch'd with a sense of Justice, and have any zeal for the Rights of Marriage, the happiest and best Institution in the World, and the most Sacred and inviolate Faith of the Matrimonial Contract,

For, Sir, most true it is, that many and great are the advantages to mankind, that proceed from the state of Marriages (that is to say) a propagation of our kind, honest and well-becoming the Dignity of our Nature, a more effective and busie care of two Parents in Educating our Children, by which the better improving our kind is provided for.

This State secures to every Child a Father, as it doth appropriate the Child to the Husband, so that we are entertained also with the love of our Children, as well as the Woman who would otherwise enjoy a pleasure, of which we could hardly ever partake.

The labours and cares of our life are encouraged, sustained, and rewarded by the love of our Issue and Posterities, and they enjoy the Riches, and Honours, and Rewards of their Fathers Wisdom and Virtue, which would otherwise determine into the first acquirer, return to the *fiscus*, or without satisfaction, be bestowed upon a less beloved Stranger. The worthy and generous ambition consequently of performing worthy Actions, and rendering our selves useful to the publick, would cease and languish, the publick good be utterly neglected, and Kingdoms and Commonwealths dissolve, and we become again as Savage as the Beasts themselves, unguarded and without the comforts or Ornaments of humane life.

Cecrops from his Institution of Marriage at *Athen* is honor'd with the Title of *depos*; by this Institution we all become *depos*, and know our Fathers, Without Marriage, our great men, who undervalue and disgrace it, had found themselves among the heard, and for ever there had continued and never enjoy'd the honours of their Ancestors, from whom they vilely degenerate.

But besides the advantages that we derive from this State of Marriage to our whole kind in the better providing for the Improvement of humane Nature, and the accommodations of life: it doth immediately confer an honour and dignity upon our nature, when we do those Acts that are common to us with the Beasts, we do not in this State perform them brutally. They are the effects rather of Friendship than Lust, and a kind of Chastity belongs truly to these Amours.

By the Enclosure of this State we have acquired Modesty to our Nature; Thereby the very Appetites of Nature are duly retrench'd and brought into Rule: and this by Example becomes a Bridle and Restraint to the Younger Sort, before they come under the guidance of Reason and Understanding, and directs the Natural Pudor to take care of their Chastity.

Whilst we stand to the Obligations that this State puts us under, we are free from the Incontinency of a Vagabond Lust, which is infinite, unbounded and unsatiable, it befools as many as it possesseth, and makes them become Vain, and light to Contempt, utterly useless to any Manly purposes, betrays them to Gluttony and Sloath, and an incurable Voluptuousness, leaves them without Soul, and without Vertue, sinks them into a low and Brutal Life, and leaves them without fear
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of God, or regard to Men, and makes them the vilest
Knaves, gives them a Languishing and Spiritless Health,
and often precipitates them into a nasty and squalid
Old Age, and a hasty Death, they are always per-
secuted with contempt and dishonour whilst they live,
and their Children Inherit their Shame, fore that they
are Sinners against the Laws of Modesty and Decency,
which this State hath Introduced, and Dishonour Hu-
mane Nature, and Violate that Natural Pudor, by this
State directed and fortified; which so directed, the
Moralists call *Pudicitia*, which once lost is irrepara-
ble.

Lasa pudicitia est nulla reparabilis arte.

I had not made this Digression, but that I fear, The
Contempt that this Licentious Age hath brought upon
Marriage, gives occasion to lets considering Men to
trifle with Matrimonial Causes, but the mischiefs that
are consequent upon the contempt of Marriage, have
sufficiently Reveng'd the Indignities done to that State,
and Vindicated its Honour, *viz.* Spurious and Degene-
rate Broods, as vile in their Manners, as they are vilely
Got, and worse Bred. And hence it is that the greatest
Families often last not longer then the single Life of a
Virtuous Man.

Conjugium

Conjugium vero Esse vere sacram non humanitas sed divinitus repertam magno consensu gentes crediderant, saith Grotius. And they who truly consider the matter must thus conclude.

Marriages agreeably have been every where hallowed with holy Rites, the Offices of Religion, and the Benedictions of the Priests: it being a State directed to, and capable (if blessed by God) of producing, and ministering to many inestimable Benefits to Mankind; Marriages have been in all Ages every where celebrated with festival Joy and Mirth, and every Man hath a Congratulation for the new married Couple; as if it did import some common and universal Good: Many priviledges have been granted to this Estate to invire and encourage it, it hath sometimes been made necessary and enjoyn'd by Laws. The *Jews* take themselves oblig'd to marry, and that early too, and did allow only a temporary Dispensation for publick good to men that might in that interim of time make themselves very useful to the publick. The Entry into that State made easy and expedite discharging Conditions, that lay any Restraint upon our Liberty of Choice where we are capable of choosing.

The Government hath provided Formula's for this important contract, that the contractors may not be deceived in their intention for want of words significant to that purpose, and operative of that contract, but in these their Provisions they have not inserted any *verba irritantia* and made the Marriage void, if the words used by the contractors do conclude to that contract, though they do

depart from the Form & Ceremony prescribed, and kindly directed by the Government, in favor of that state. Governments enjoyn publick Marriages, that they may be better attested, and that that sacred contract be not frustrated and defrauded, but they do not annul clandestine Marriages. And certainly a greater violence was never at any time done to Nature, nor any absurdity greater enacted by the infamous Council of *Trent*, than that Councils declaring clandestine Marriages to be null and void. The forms of espousing amongst the *Jews* were easy, in few words obvious, no certain Form enjoyn'd. Some of them I will recite out of *Maimonides*, *Ecce tu mihi es per hoc dispensata*, *Ecce tu mihi tum hoc es in uxorem, mea es, es mea accepta, es in potestate mea*, but the more common Form was, *En dispensata mihi es hac re secundum ritum Moysi & Israelis*. He also relates the Law to be thus (*Viz*) *Vir potest Mulierem desponsare quivis Lingua, quam ipsa intelligat modo verbis utatur significationem talem, ut modo dictum, habentibus*.

But when Marriages were to be dissolv'd by Divorces, in favor of marriages, and in disfavor of Divorces rather permitted as used amongst them, than allowed or approved. It was required, that there should be a Bill of Divorce, and in this they require abundance of Ceremony, and Form as well about the writing of it, as the delivering to make it difficult, and unfeasible or very easily defeated, that so upon the abatement of the husbands displeasure, the marriage may be reintegrated by some matter of Exception to the Bill of Divorce; about which there were a Number of Questions even to the

the Ink and Pen, wherewith it was written the number of the lines, and the Figure of the Letters.

A precontract or inchoat Marriage is indissoluble, tho in other Affairs the Rule of Law, which almost universally obtains, is *Nihil actum videtur quam diu aliquid superest agendum*. But such effect this Precontract hath, that it disables and rescinds any subsequent Marriage, tho Children are born in the after Marriage, and tho the Person married to the Precontractor was ignorant of the Precontract and no *Dolus malus* imputable to the Person so married.

The matrimonial contract being founded in Nature, and made sacred by Divine institution, being necessary to mankind, and producing the greatest Benefits, becomes thereby the more sacred and inviolable, and can therefore be more early made and agreed, and for this reason the Persons are reckoned competent to make a valid marriage at such an age, at which they cannot oblige themselves with effect in any other affair or concernment, nay then when they can scarce by any Act render themselves criminal, and are scarce *Fili praecepti* as the Jews call them. The mans consent at 14. and the Womans consent at 12 is unalterable, and irrevocable, for that besides at these Ages they can make Friendship, and chuse their Companions, and can separate out of many some one with whom they are more particularly delighted, and pleased with a propenseness of affection, and entertain one another with a pure and undesigning love, and complacency, not at all sullied with the Passion of concupiscence; and Marriages, that are made upon such inducements under the guidance and allowance of their Pa-

rents, and Tutors, if all things else are agreeable, are most apt to prove the most chaste, happy and undefiled Marriages. The Law is wise and good, that allows them the inducement upon which it is grounded is reasonable, and the Law it self commendable. But however Law it is, and to that as to the measure of right, we must determine our selves, and conform our Consciences. A present sufficiency to Acts of Venery is no necessary requisite to the making of that Contract rate and firm. Neither is the performing of them necessary, in any degree, to the making the matrimonial contract compleat: by that contract, indeed the Man and Woman respectively have a right to each other; but no right can be created by the Exercise of that right. I have often observed with great pleasure the Marks of Divinity in the Law of *Moses*, and in the institutions of that Common-wealth, but in nothing more then in the cleannels of that Law, of which I shall remark one Instance to the present purpose; there was amongst them appointed Espousals before they proceeded to marriage, which could not be rescinded any other way, but as marriages were undone; and that which was adultery in the woman after marriage, was accounted, and punish'd as adultery after the Espousals, and before the marriage, but infamous it was to contract those Espousals ^{now} or concubitu, as it is amongst us to marry upon the first interview.

This interim between Espousals and Marriage, was design'd for conciliating a Friendship between the Espoused Persons such a love, that might support the happiness of that conjugal Estate, and last when the fervors of lust were abated

abated: very necessary to that salacious People, who without such provision would have had greater pleasure *in matrimonio quam marito. nuptiis quam in nuptiâ*, and the marriage State must then needs have been very transitory, when they had the liberty amongst them of divorcing. And this Law, and practise *Lycurgus* transcribed for the Common-wealth of *Sparta*; So little is the business of *Concubitus* to be had in Consideration by the Virtuous and wise considerers of what is necessary and convenient to the making the State of Marriage happy, and virtuous and blessed with a lasting Friendship; as also what is precisely requisite to the making a Marriage.

So great assurance this contract gives us, and such Reputation all Law-givers give to the faith of marriage for the quieting of Jealousy and Caprices, and curious Enquiries of suspicious Men, and for the peace of Familys, and for the encouraging that State, and to distinguish it from a loose Concubinar. That the Husband is presum'd to be Father of the Children, when he cohabits with his Wife, and will not suffer the legitimacy of a Child born in marriage to be litigated, and disputed: And indeed it cannot be disputed, for filiation cannot be prov'd or disprov'd, and no Judicature ever allowed any allegation, to such purpose an allegation of this nature, is not more injurious to the Person to whom it is objected, then it is against the sacred rights and priviledg, that in all ages have been constantly acknowledged, zealously asserted necessarily to result from the matrimonial State. It is no less iniquity to form his Judgment by any respect to such suggestion, whencesoever it comes, or to his own surmise.

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The matrimonial contract between competent Persons cannot be really prejudiced, by any mistake in Judgment, or by any Laws whatsoever of human legislation in derogation thereof. The rights that result from marriage differs in this, from all other rights whatsoever, this may seem strang; But for this, I have the Authority of an universal consent of the Drs. of *Canon*, and civil Law, who all tell us *That* a sentence against a marriage, doth not *transire in rem judicatam*; whatsoever can be submitted to judicatures, and is under the Government of Laws, the right of the matters submitted, is such as the Judgment of the Court of the last resort makes it, and whether the Judgment be right or wrong according to the natural reason of right Justice, it matters not. And if the defendant before had a right, the right to the things in pretence, by the Judgment for the Plaintiff, ceases to be the Defendants, right any longer, and can be no longer possessed without a publick injustice; all those things, that are in our power to give or alien, may be thus forfeited to the constitution of the Government, under which we are and of such causes it is true.

Prator jus dicit quum iniquum decernit.

But in all matters wherein any Law of God hath interposed really, or in general opinion, in matters, that are bound upon us by an Oath, or a religious Vow in a matter lawful, whereby we have a Conscience towards God, no human Authority can make us safe, if we depart from the rule of our own Conscience. Decrees of Councils, and Laws of Princes cannot change a Mans understanding, neither can sentences in matters of this nature take the
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science in Execution, and Execute themselves by changing the mind, and enforcing a belief upon the understanding, and for this reason our *Canonists* and *Civilians* conclude, that matrimonial causes do not *transire in rem judicatam*. They can punish and afflict the Person, disgrace the marriages upon strong Presumptions in fact against the pretended marriage, or for that marriages are made otherwise than as *Laws* or *Canons*, for preventing inconveniences have directed. But they who know the truth of the fact, and are under the obligation of a contract made in pursuance of Gods institution, and not contrary to any injunction of his appointment, must as much as in them lyeth, and as is possible for them, perform, fulfil and observe it, and their Consciences are onerated with it everlastingly, and cannot be discharged by any nullity Sentence whatsoever.

Such Laws as are made arbitrarily for the restraining of the liberty of marriages permitted, or not prohibited in first nature; If they do use only prohibiting words, and not add expresse words, that a marriage so made shall be null and void, a marriage prohibited is not therefore null and void; for though it may be very convenient to make further a restraint in the matter of marriages, than Nature peremptorily enjoyns (and in such Laws the rule holds, *Quod fieri non debet factum valet* obtains.) Tho not further then reason of Decence, and General convenience doth perswade, which is always the rule to refined understandings, and where there is a perfect virtue.

Yet human Laws which command, and not perswade are never interpreted to onerate the Conscience, nor are in-

intended beyond the exprefs letter thereof, to tye men to the neceffity of performing acts of virtue, which ceafe to be fo if done by command, and not by a prompt generosity and eafy inclination. The formal reason of virtue confifteth in being voluntary, and free, that it be not done of constraint, but of a ready mind, no man can be charitable or grateful in any inftance, if he be fo by the compulfion, and constraint of a Law; neither can he be counted chafte, valiant or patient, if he be not fo in conformity to the inward love, and Complacency, and fatisfaction he takes in comporting with the Rules of the like Virtues. It is no Exception againft the legal validity of any act, that it is not altogether without fault, and the moft commendable.

The Lawes of nature themfelves have different confiderations, Acts of vitue in the firft degree are enjoyn'd by the Law of Nature. (*viz.*) where the not performing them renders the man vitious and mifchievous, and our conicience for thefe omiffions by fharp convictions, and fentences againft our felves, binds us over to the expectation of dreadful punifhments to be inflicted upon us at the great Tribunal. But we are invited to great and noble acts of virtue, by the gloriations and applaufes of our confciences, which are the anticipations of that Honor and Glory, that cometh from God. To fuch Acts, we do not find our felves compelled or urg'd by fear, but invited to them by the worthinefs of the Acts themfelves, and the Honor that attends them, and the comfortable expectation of a glorious Immortality; But befides the neceffary firft Acts of Virtue, which is a little elfe then not being wicked to
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which we are bound by fear of punishment, and the free and voluntary Acts of a noble virtue, to which we are invited by increas'd rewards; which are threatned and promised, and in some sort performed and executed in, and by our own Consciences.

There are a sort of Laws of precise decency, which our Consciences oblige us to observe; for our conscience in whatever it dictates, declares the Law of Nature to us, and the not observing these matters of decency affects us with some shame, and the observing of them renders us honest, to our selves the neglect of them is rather *verguis* than *quodguis* the greatest punishment thereof, in Nature is blushing, and the greatest reward of observing them is, that we do not fall into a Disesteem of our selves, and a dejection of mind. And in conformity to the rule of our conscience by civil Government, matters of indecency (when prohibited by Law) are only noted with ignominy wickedness is punished, and virtue is rewarded. The procedure of our consciences hath governed human Laws, as well as it instructs us how God will proceed with us; by which we become inexcusable.

Pub. Mim. Grave est judicium ubi nullum est prejudicium.

But all Acts, that are prohibited in nature as undecent, and inconvenient are not therefore null and void, for that the indecency may lye in the very Act, and not in the effects, that that Act produceth, and the inconveniencies, that follow the rescinding of the act may be greater than the indecency, and inconvenience of the act it self.

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That which I mean to say is, that the doing a thing undecently, to which I have a Competent authority doth not therefore want effect, Laws prohibitory of such Acts. If they do not irritate as well as prohibit, leave such Acts when prohibited in force, much rather have they effect when there is no such prohibitory Law, and therefore the consideration, that a thing is not unquestionably well ought to have no direction in a Judicial sentence, for making any Act done by a competent Power null and void. A Sin in nature is much, rather to be avoided than a transgression, which seems to be forbidden at most by the rules of decency, and the precise measure of conveniency.

In matrimonial causes, nothing is to be favor'd but the marriage it self, no quality is considerable in the Persons contracting marriage, but that which give them capacity to make the contract: Whether the Persons be of the same, or of different Religions of a true or false Religion makes no matter: In case of a Marriage, between a Christian woman, with a Pagan or Jew if any thing can impeach the Marriage, its because they do not contract for a marriage according to the Christian Law, but under the Liberty of an arbitrary Divorce, and Polygamy which is not agreeable to the institutions of our Saviour. But if a Jew, Pagan or Mahometan received the Christian Baptism, but yesterday he is a better Christian than if he had been baptised in his Cradle for that he was so lately baptised if he be sincere in his profession, which none but God can know, but Man ought to presume. The proof of the Marriage is to be favor'd by the Judges in matrimonial causes: Where the probabilitys on either side, for or against the marriage are equal. The danger of Sin of an
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unpardonable Sin which may be occasion'd by a sentence against the marriage, ought to determine for the marriage: The consideration of this, ought to be put into the Ballance of Judgment in such cases, and make the Sentence.

In such cases the evil Fear'd is greater than the Good, that can accrue to the Person. that pretends to dissolve the marriage, which is only the Liberty of another choice. In Charity therefore the Judgment, ought to prevent the greater evil by recludng the occasion of it, and determine in favour of the pretended marriage, which is innocent and safe; but so probably prov'd. Besides that the incurring the probability of occasioning this Evil cannot be justified by the Freedom they design her. It is not agreeable to the favor, that is due and allowed to the marriage contract, that it should be exposed to all the Artifices of Wit, and Cavillations of Law, that the Wit of Men can invent to lessen the credibility of the Testimony produced in its Confirmation. By a single Artifice of putting the marriage under an ill Name, by calling it a Clandestine marriage with an accent of censure they make all the Witnesses, that are proper to testify such a Contract, and are to be present, if any other, for that bad Name sake *suspectæ fidei*, and incompetent Witnesses. Clandestinity is the word of reproach; which carries with it no fault but a neglect of that solemnity, which would have put the matter out of all dispute; this is the disparaging Name they affix with art to this Marriage. But an innocent and prudent reason the case it self gives, and assigns for that Circumstance of the

Marriage; and that which tells us why a thing is so, and so done, and in such manner, contributes to the proof that the thing was really done, when performed in that form and manner. If the marriage had been celebrated in the Church it had been less credible, the Mothers consent would have been less credited, and she it may be dare not have own'd it to her defeated Husband. The Clerk that marry'd (which is to be complained of) was notoriously corrupted by threats, and promises to deny the marriage: Under these temptations he is a notorious falsary in what he saith to avoid the marriage, and yet what he saith under these circumstances in affirmation of the Marriage, is rejected as not credible, upon this general rule, *falsus in uno falsus in omnibus*; when there can be no greater Evidence in the World of the reality and truth of any matter, then violent and leud endeavors to have it disbelieve: Except it be the testimony of the Man himself, thus practis'd with, on the behalf of that matter thus endeavored to be suppressed. A clearer Testimony was never given to our Saviour of his Divinity then when he was acknowledged by the Devil, the Father of Lyes to be the Son of God.

But after all this the terms of marriages are made yet harder by the nature, and constitution, as generally apprehended, of our Judicatures, that are to judge in matrimonial Causes, which if legally such as it is generally taken to be; we shall continue unhappy in this matter until we have a Law for our redress therein. But the grievance is so great, and the contrivance therein so little commendable for the Honor of our Nation, that I shall offer
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some Reasons to your better consideration, to prove that the Ecclesiastical Courts have at this time no Judgment in matrimonial Causes; but that the right as well as the fact of marriages; are cognoscible only in our common Law-Courts. At present the fact of a marriage is try'd, and judged in our common Law-Courts. The right of a marriage is litigated in the Ecclesiastical Court: Thus the question of right, and the question of fact, which are inseparable in true Judgment are divided. After the common Law hath enquired into the truth of the Marriage, the Ecclesiastical Courts upon a pretence of having the Judgment in the Question of Right, whether the marriage be lawfully made, they proceed to falsify the Verdicts and Judgments in our common Law-Courts, and to hold Plea whether the Marriage was *de facto* made or no, which is all the matter in Judgment in that Court, after it was settled in its proper Judicature: And so we have two thwarting Judicatures that are not subordinat, and yet this is not all whilst the matter hath been clear'd on Mr. *Emmerton's* behalf in the Court of comon Law, and consequently he ought to have all the rights of a Husbaud, possession of his wifes Lands, and of her person: The Chancery interposeth, that hath no manner of Cognizance in the Cause neither of the right or fact; and at pleasure sequesters, and disposeth of the Estate, and Mr. *Emmerton* must content himself with Alimony at the allotment of that Court, as if he were the Adulteress. But it is notorious to the World how dilatory that *Curia Christianitatis* is, which allows so many appeals and so expensive: That if Mr. *Emmerton* had not marry'd young, he might have been superannuated
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for Marriage before the controversy is ended, and if his Fortune had not been considerable, he might have wanted bread more than a wife, besides that they have given Judgment against him by the delay, and he hath lost his Wife except she be reclaim'd by a very improbable repentance. For want of a timely remedy he hath lost his wife irrecoverably, and it is not in the power of any Court to restore her to him, for she hath now alien'd her affections inveteratly. He hath lost her by the delays of the suit, and the countenance therein given to her pretence hath engaged her in great difficultys. A suit which supports it self by such means as use to feel the power of a Star-chamber: It was accounted a vile Crime amongst the Jews (and forbidden by the 10th. Commandment, *Thou shalt not covet thy Neighbours wife*) to breed and foment a dislike in the Husband towards the Wife, to provoke him to divorce her to the purpose to marry her: But this is a far worse Crime than they were capable of acting; for they have wrought the Wife between dislike, and enjoyment to divorce and abandon her Husband; a thing monstrously wicked, and very unnatural: And of this Crime the delay, that hath been given to this Cause is chargeable.

I am glad it is imputable to things only which have no conscience, and not to Persons that have. But this is not all Mr. *Emmerton* knows, he was marry'd to Mrs. *Hide*, and cannot be free from his Marriage, nor marry another without committing Adultery; since no Authority can dissolve the Marriage, and the declaratory Sentence of a Court, that they were not marry'd cannot alter the truth

truth of the case, but he is still her Husband, and this all the *Canonists* will acknowledge, for that matrimonial Causes do not *Transire in rem judicatam*, neither can the Marriage be dissolved by any misbehavior of the wife, a Sentence of Divorce doth not dissolve the *Vinculum Matrimonii*, and therefore he can much less (in the opinion of these Courts)discharg himself from the marriage Bonds; So that there had need be a very clear Evidence, such as carries no doubt with it; that can warrant a Nullity sentence, that is charged with such mischiefs and inconveniencys. But this cannot be the true State of the Evidence in this Cause, since notwithstanding all the Art used to lessen the certainty of the Marriage, and bring it into some doubt, the greatest Authority hath been for confirming the Marriage in all the instances of the Causes; Nay the best managers of the Cause on the behalf of Mrs. *Hyde* have apply'd themselves not so much to invalidate the Evidence as to disgrace the Person of Mr. *Emmerton*, and to provoke thereby an Envy against his Right to the Lady which ought not to be endured by any Court; much less ought it abuse, and byas the understanding of a Judge, and corrupt his Judgment.

But such hardships, and inconveniencys as these will not be considered, and are hard to be prevented in such Commissions as are issued out in this Cause; In which Men are named not for known Wisdom, and sufficiency to judge and determine Causes in this Nature; but for the greatness of their Quality. No Man can act beyond his sufficiency, and in a doubtful Cause, as all Causes are doubtful; or with little skill may be made so, to Men that

that have none. The consideration of Friendship will determine him that cannot govern himself by the Merits of the Cause, or will not guide himself by the Judgment of Men of the best Authority and Reputation. It is very hard to be judged by any Man, whose Honour doth not depend upon right judging; and where the Error in judging may be with more probability imputed to the want of skill, and incompetency, than to wilful Mistake.

So that a probable opinion that this cause and others of the like nature ought to have their final Judgment at Common Law, will meet with a ready and free consideration I doubt not with our Common Law Judges, since they are so untowardly and contingently carry'd in these Commissions, that their proceedings meet with a general dissatisfaction, as they are a mighty Gravamen to the Litigants.

That which I have to say in this matter had need be very clear, since the notion may seem new, and a great prejudice lyes against it. But it will appear not new before I have done with it, the premises from which I conclude it, be all agreed to me; and the Conclusion I make from them will be clearly inferd: It will appear to be as useful as true, and therefore I hope have a favorable Reception.

I do not intend to controvert or bring into Question the Right of the Ecclesiastical Courts, to judge in all Causes of Offence against the Laws of Chastity, and the Enforcement

enforcement of the performance of the conjugal Rights: And to compel the Prec^{on}tractors to proceed to Marriage, and perform the Conjugal dutys. They may retain a Cause de *jactitatione maritagij*, for that the common Law allows no action of the case without special Damnification, tho in it self it carrys with it a prejudice, and is a very great incumbrance fit to be removed by the Authority of a judicial Sentence. As also in a promise of a Marriage, where there hath been any Execution of the Agreement to enforce a Marriage: These two last Order of Causes belongs to them upon the same reason, as Performance of Covenants in kind, and Examination of Witn^{es} in case of pretence of title in *perpetuam rei memoriam* belongs to the Court of Chancery, that is as a derelict of the common Law, and for a further Reason for that matter may be concern'd, and mov'd in these Causes which are not so becoming our more publick Tryals at common Law. To the Ecclesiastical Court belongs all Causes of Divorce, and the Punishment of incestuous Mixtures, where Marriages are void: which our Law ought to judge, and all other sins of incontinence which are most aptly punished with shame; a restraint of the same Nature which God hath planted in our Nature for the bridling those natural Appetits which betray Men into such inordinacys: And in this our Government most commendably follows the Indication of God himself in our Nature. I have a great Honor for the Gentlemen of that faculty, and do not, envy any matter of judicature that truly belongs to them; I do believe a true civilian, that hath the Learning that belongs to that faculty to be the best accomplished Man, and of the most universal Usefulness to the World; and

if all Causes of Matrimony were assigned to be judged only by Men of that Faculty, and not by miscellaneous and fortuitous Heap of Men which make the Delegates in most Causes: This Cause of Mr. *Emmertons* Marriage had not been so afflicted and vexed, and prejudiced by Reasons which publickly to mention, would I fear be accounted a Libel against the Government; for the Eminent Drs. of that faculty have acquitted themselves honorably in the Cause, and have given Reputation to the Cause of Mr. *Emmerton* under all the discountenance, that hath been cast upon it for little other Reason than from the disparity in his Condition with that of the rival Litigant. It is not I declare any Exception against the Justice of the civil Law-Courts, or against their Law, that moves this Question: But the meer Right, and Cumberfomness, and vast unweildyness of these Commissions of Appeal: And for that whatever shall be the chance issue of this fortuitous Commission, It may be undone by virtue of a prohibition out of the Kings Bench, which as well reverseth sentences after they are pronounced for that the matter belonged not to that forum, as it doth inhibit their procedure where it comes in time. To prove that matrimonial Causes are not of Ecclesiastical Cognitance I shall now proceed. Matrimony is as old as the World, and it will be hard in the search of History to find a time when any People was without that institution longer then without Government; Marriages and Familys were before Government, but Governments every where in all Ages injoynd them dishoner'd and disgrac't Fornication, and concubinat honor'd Chastity, and made Whores infamous. Marriage was no invention of Priest craft, as a prophane immoral man in Leud Rhime dare pronounce

Poet,

Poet, he ought not to be called that title which might belong to his inventing faculty he hath forfeited by his impiety, and immorality Poets were the antient Theologues and Teachers of manners, he that is a Poet ought to know,

Quid deceat quid non quo virtus quo ferat Error Hor. Art.
Scribendi recte, sapere est & principium & fons. Poet.

This Mans owes all his esteem to the Debaucherys of the Age; If the People should recover their Wits which they have lost with their manners they would use him, as the People of *Athens* did *Dionisius* at the *Olympick* Games for his wicked Poem, tho they at first were taken with the composition. It is no matter who such a man disgraceth, that publickly blasphemes, reviles Marriages, and the Laws of Chastity; such publick impudence qualifies him to say or write whatever is false, whatever is evil; he is bad enough to disgrace the worst of Men, and the worst of Causes.

Marriages were every where injoynd by Governments, and promoted, assisted and conducted by Laws and Acts of state, and the liberty of marriage had more or less restraint, as the Laws of several Nations did appoint. The Greeks, Romans and Germans forbid polygamy, But the *Easterlings* allow'd it. The Romans made those marriages unlawful, which the Law of *Moses* made so, and also forbid other marriages that were not by the *Mosical Law* prohibited, as for Example. The marriage of the Uncle and Neice which the Law of *Moses* doth not forbid, tho it forbid's the Nephew to marry his Aunt or Uncles Wife:

But the Asiatick's us'd a licence of polygamy, and permitted all marriages but those that the Roman Law call's *Nuptia nefaria* i. e. Between Parents and Children and even such marriages were sometimes committed amongst them. But causes of marriages were alwayes, and every where judged by the ordinary Courts of Judicature, and as other contract's were judged: The Law's of marriage were not dictated by the Priests, but enacted by the Legislators, neither did ever any *form* belong to the Priest hood in that capacity before Christianity.

It was not the office of the Priest's of the pagan Religion, to instruct the People in moral's, or to guide their Consciencies by the rules of virtue; for this they were beholden to their Phylosophers and Poets: paganism was a Religion divided and abstracted from morality; That did neither teach it, nor enforce it, their Priest's were Sacrificers, Conjurers and Sooth Sayers, and no office did belong to them that referd to the state, except in difficult affaires of state, to serve a turn sometimes by their Interpretation of Augury's, and by their Arts of Divination.

The Laws of Marriage given to the Jews were the Laws of God, as all their other Laws were, and administred as all their other Laws were administred, and not appropriated to a Judicature of Priests: Their Laws tho given by God did oblige only the People of the Jews; and lost all effect as Laws with the dissolution of their Common wealth.

The Christian Religion contains no institutions, that can properly be called Laws, except the Institution of the Sacrament

crament of the Supper of our Lord, and Baptisme. But it gives rules and precepts of an Excellent morality, and requires greater degrees of Virtues to be exercised: A greater Chastity, Mercy, Goodness and Temperance than the Mosaical Law requir'd in the instances therein defin'd and requir'd under penalties and a civil Sention.

By and in analogy to the general Institutions and Precepts of our Saviour, the Christians were to govern themselves not determined by any definitive Law, and as in the State of nature the conduct of these Virtues, was by the measures of a Wise Man, *prout vir prudens definiuerit* to Christians, the General rule of all their actions is, *prout vir Christianus definiuerit*. *ὡς δὲ ὁ σοφὸς ἄνθρωπος ἐν νόμῳ τοῦ κυρίου*

The Christians, though they did not take themselves to be bound to the Law of *Moses*, they took themselves oblig'd not to do less than that Law requir'd, but to proceed to perfection.

The Gentile Christians by the Council held at *Jerusalem*, *Act. Apost. 15. 28.* Were enjoyn'd amongst other things *ἀποχρεῖν τῶν ἐθνικῶν*, which Mr. *Selden* in his Book *de jure Gentium Secundum Hebraeos*, interprets to forbid all those Marriages, that were Interdicted to the *Jews*. He that will take the pains to consult him will be very well pleased and satisfied with his noble interpretation of that text.

The Christian Church did after proceed further in several prohibitions of marriages, for the better security of the Virtue of Chastity, which was in the first Ages the Honor and Glory of the Christian Church, they highly commend-
ed.

ed Celebrate disgrac't Second marriages (though they could not forbid them) and prohibited sometime, that they should not be honor'd with the presence of a Priest when celebrated.

*Vides Sacratas Virgines,
miraris intactas anus,
primiq; post damnum Tori
ignis secundinefcias.
hoc est monile Ecclesia
his illa gemmis colitur.*

prudens ad Lawr.

Even for Adultery, they would not allow it commendable immediatly to dissolve the marriage, but to live in expectation of the Womans Repentance.

When the Governments became Christian they became conformable to her rule and honor'd her more pure institutions, and were governed by them, for that marriages was made a Symbol of the Vnion between Christ and his Church, and the exercise and conduct of a glorious Christian Virtue was principally concerned in the limitation of marriages: The declaring in what degrees and in what circumstances persons might marry, or not marry, was submitted to the directions of the Guides of the Church,

And so in all Christian Governments, a marriage, that was made well in fact according to the order of the secular Law, was lawfully to be undone if the Church judg'd the persons not fit to come together in marriage for any reasons of great undecence or offence against the Christian Virtue of Chastity.

But

But this Power and Authority so duly lodg'd in the guides of our Religion, for that it was to the purpose to instruct and guide Christians, how to behave themselves in one of the principal Virtues of their Religion, was insufferably abus'd after the Papal Usurpation.

The Pontifical and Canon Law multiplied restraints upon marriages to inconvenience, and relaxed them for money, and the most incestuous marriages they made lawful at a great price. The Roman Priests despise marriage; and make it more profane than Fornication, nay then Adultery it self. And yet they have turn'd marriage in a Sacrament, and have ty'd the *Vinculum Matrimonii* harder upon the laity than our Saviour left it. The *Vinculum Matrimonii*, they declare and determine to continue, when the Woman is divorced for Adultery. Though our Saviour allowed Adultery a good cause of Divorce, for amongst the *Jews* there was no other Divorce, but what did utterly rescind the Marriage.

Sir *John Vaughan* was mistaken when he calls this divorce an impeachment of the marriage, but this mistake he run into, to support his Opinion, that the Statutes of *H. 8.* hereafter considered left some marriages to be impeached by the Ecclesiastical Courts, and his other opinion he grounds upon this *Hypothesis* vizt. that Questions of marriages belong still to the *Curia Christianitatis*, notwithstanding these Statutes of *H. 8.* which opinion of his will appear a mistake by what we have hereafter to say. For the *Romish* Church hath not done so well with us in the case of an Adulterers wife: But in this if in any thing they are

iniquiores in Matrimonium which hath been laid to their charge; for they will not allow the marriage for this cause to be impeached. But have bound heavy burthens upon the state of marriage, to tempt the Laity to decline it, whilst they disdain it.

In this we complain of that Church, that they departed from the primitive Church, in making that necessary to all Men; which the first Christians only commended under a Liberty of Choice to the good and virtuous, and bind them to sustain the Calamity of a continuing Marriage in all Cases; whether the Man can or cannot sustain the want of a Wife, and when the womans amendment is desperate as well as when hopeful. By this means, the condition of the Man was made very afflictive and remediless. And without relief or recompence in the satisfaction of mind, which accrues from the generous and worthy Resolutions proceeding from an Extraordinary virtue: A remedy against this Evil, the Reformation hath attempted but could never yet effect.

But against the mischiefs of their arbitrary Restraints of commendable Marriages: It is provided by our statute Laws which we shall now consider, and from thence it will appear that the Question of the lawfulness of marriage, for the Reasons aforementioned, divided from the secular Courts is now consolidated with the Question of Fact which was never remov'd from the civil Judicature. As also for remedy against the lavish use of the dispensatory Powers, assum'd by the *ROMAN* Church with forbidden, and unlawful marriages for this purpose. It was enacted and declared 25. U. 8. Cap. 22. That these marriages following of
which

which some are nefarious, and others accounted more abominable incestuous, that is to say

Of the Son to the Mother
Of the Son to the Step-mother
Of the Brother to the Sister
Of the Father to his Sons Daughter
Of the Father to his Daughters Daughter
Of the Son to his Fathers Daughter born by the Step-mother
Of the Son to his Aunt his Fathers or Mothers Sister
Of the Son to his Uncles Wife
Of the Father to his Sons wife
Of the Brother to his Brothers wife
Of a man to his Wives Sons Daughter
Of a Man to his Wives Daughters Daughter
Of a Man to his Wives Sister.

Are plainly prohibited by Gods Law, and that no man can dispense with Gods Law, and that a separation be in such marriages be definitive Sentence in the Spiritual Courts of the Kingdom, without prohibition from, or appeal to *Rome*, of such marriages.

By this Act marriages did become of lay Cognizance, saith Sir John Vaughan R. 214. for the Kings Court were requir'd by this Law by the Kings writ of *Mandamus*, to enjoin the Ecclesiastical Courts to treat such unlawful Persons, pretending marriage, as incestuous Persons. But whether this statute made marriages of lay Cognizance, I will not determine, for the statute that direct to whom administration shall be committed, doth not take the matter of administration to the Common Law Courts, neither do the writs of our Courts of *Westminster* which issue to the Bishops, com-

manding them to assail an Excommunicant give the power of the Keys to the Secular Courts.

There was nothing by this Act of 25. H. 8. done to restrain the power of the Church in declaring what other marriages were unlawfull. This Act only restrained the Popes power of dispensing with such unlawful marriages, and gave Authority to the Kings Court, to injoyn and command the Ecclesiastical Courts, to dissolve such marriages by their definitive Sentence, without regard had to the prohibition from, or Appeal to *Rome*.

But the statute 28. H. 8. C. 7. the former Act of 25. is repealed, but the power of the Papal dispensation in such marriages is condemned; the said marriages are recited again, and declared to be prohibited by Gods Law only, with these differences, that in the prohibition of the Sons marrying the Step-mother, of marrying the Uncles Wife of the Father, marrying his Sons Wife of the Brother, marrying the Brothers Wife is added, carnally known by the Father, Uncle, Son, Brother respectively, and in the prohibition to marry the Wives Daughter or her Sons Daughter, or her Daughters is added, having Carnal Knowledge of his Wife.

And with this further addition, That if any man carnally know any woman, all persons in any degree of consanguinity or affinity of the persons so offending, shall be adjudged to be within the said prohibitions, in like manner, as if the parties so marrying one another had been married: for instance, if a man carnally know a Woman not marrying her, he is prohibited to marry her daughter or daughters daughter. In all other clauses this Act, and the former Act of 25 are *Verbatim* the same, and this Act is in force. Sir *John Vaughan* says, *Rep.* 215. that these degrees were the second time made of Lay Cognizance. In this Act dispensations for
such

such marriages are prohibited : And for that this Act did declare these marriages to be prohibited by Gods Law, they were declared and made indispensably unlawful, null & void, and that they could not be legitimated by the Papal Authority. And thereby the Common Law Courts had a power given them to issue out the Kings writ of mandamus, to require them to dissolve such Marriages by their definitive sentence.

But the Arbitrary power of that Church in defining the lawfulness of marriages, yet remained in full force and unimpeached, which was an Authority very much abus'd by unreasonable restraints of the freedom of marriage, for Remedy of this, there was a provision made by 28. H. 8.C.16. That all marriages made before the 3d day of Nov. 26. H. 8. whereof there is no divorce had by the Ecclesiastical Laws of the Realm, and which be not prohibited by Gods Law limited, and declared in the Act made this present Parliament, for Establishing the King's Succession or otherwise by holy Scriptures, shall be lawfull and effectual by Authority of this present Parliament.

This Law went in Confirmation but to some few marriages, before that time made and not rescinded by divorce thus forbidden by the Canons of the Church, but yet left the power of the Church unabated still, in declaring marriages unlawful, other than are by the Law in *Leviticus* prohibited, in all marriages, but those within that time made and not divorced.

But by the statute of 32. H. 8. Cap. 34. a full and compleat remedy is provided against the unreasonable assumings of the Canon Law, to restrain the Liberty of marriage for slight and phantastical motives and inducements, by which the Virtue of Chastity was not materially promoted.

By this act it was declared, That all persons lawfull to contract marriages, that be not prohibited by Gods Law to marry ; And it is thereby enacted, That no prohibition or reservation Gods Law Except, shall trouble or impeach any marriage without the Levitical degrees, And that no Person of what Estate, degree or Condition whatsoever he or she be; shall after the said first day of the month of July aforesaid, be admitted in any spiritual Courts within the Kings Realm, or any by Graces other Lands and Dominions to any process, plea or allegation contrary to this Act, some part of this as to precontracts was repeal'd by Ed. 6. and the residue was repeal'd by 1. 2. P. m. but it is revived 1. Eliz. Cap. 2. and now in full force.

Note, That the words by Gods Law, and the words or otherwise by Holy Scripture in these two last mentioned Acts, refer both to the Laws about marriages in *Leviticus*. But for that besides the cases expressly limited and declared in that Law, other marriages within a parity of reason by the true sense of that Law, (which is the Law and the Scripture) might be intended prohibited, and therefore prohibited by that Law, it is added or otherwise in holy Scripture.

Besides that of *Leviticus*, there is no part of the old Testament if that prohibits or makes unlawfull any marriage. Christ made no Law about the Lawfulness of marriages, but confirm'd those which the Law of *Moses* had allowed, against the abuse of the liberty of divorcing, permitted to the Jews by the Law of *Moses*.

By the aforementioned statute, that Law in *Leviticus* is made the statute Law of *England*, it is become of Lay Cognizance, and however the Divines may gloss upon the text, our Judges have the Authority of a Legal and binding interpretation of that part of the Scripture.

Our Judges at Common Law, are as competent to interpret this Law in *Leviticus* as any Divines, and need not want any,

any Learning that is necessary for expounding thereof, besides, that they have senses exercised to make right and fitting interpretations of Laws.

In omnibus legibus etiam maximè odiosis quales sunt quæ tam irrogant receptum est, ubi eadem est ratio jus idem valeat. In benignioribus autem legibus etiam à paribus ad paria procedit interpretatio.

Our Courts may follow the *Karaj*, who interpret it to cases of parity of reason, or the *Talmudists* which stand within the enumerated Cases of the Law, or follow their own opinion different from them both.

The words (Gods Law excepted) cannot prejudice the Authority of our Judges in this matter, tho they are insisted on by some ; as if the whole Canon of the Scripture was to be consulted in this matter, and the whole Science of Theology must be understood before we can come to a Determination, what marriages are forbidden by Gods Law in the holy Scriptures.

To leave the Ecclesiastical Courts an Authority to undo any marriage upon a pretence, that they are the best Interpreters of Gods Law ; To give them leave to pretend the Law of God for the unlawfulness of any marriage, other then what is expressly or literally forbidden, or interpretatively, or upon construction in the Law of *Leviticus*, would make the Law illusory and frustraneous : Especially if they are left Judges of the matters, for then they can and will to be sure allow their own pretences and reasons, and no prohibition ought to issue to the Ecclesiastical Courts, or else they not bound to obey, and they have a ready answer in case of a prohibition, to the Kings-Bench (*viz.*) that Doctors differ upon the Law, this stated I proceed and conclude.

The Law of *Leviticus* is the only Law, that restrains the liberty of marriage in the holy Scriptures.

The :

The Law of *Leviticus* is become part of our statute Law, as much as it would have been, if the matter thereof had been transcribed into the Act of 32. H. 8. without reference to the text, or as if a Law of *Rome* or *Athens* had been enacted by Authority of our Parliament to be the Rule, and measure in the Government of any Affair.

But the Law of 32. H. 8. the definitive Authority of the Church of what marriages are lawful is taken away.

By reason of this Law the Ecclesiastical Courts can never bring into question any marriage, for any pretence for their Canon, that the Persons are not lawful

That the Question consequently of the legitimacy of marriages, is restor'd to the Judgment of the civil and temporal Courts.

In that this Law of *Leviticus* by our Law, is called the Law of God (tho it is not truly so to us) it must have such Authority as a Law of God ought to have, and we are to conclude, that our Law-makers intended it should have the like Effect, as a Law of God by styling it so.

As any matter that is called, and rated a *Commune Nocumentum* or nuisance in any statute Law, is for that it is so called in any Law, indispensable by a *Non Obstante*.

All the Laws of God, which prohibit any thing to be done from that absolute Right and Dominion, that God hath over us; makes all Acts contrary to the prohibition sinful and impious, without all Effect null and void; It is not so in human Laws, except they add to the words of prohibition, words that irritate.

A Marriage may be forbidden by human Laws, that do not annul the marriage when made of such Laws; there are many, *Ulpian* calls them *Leges imperfectæ*.

For that the Law, abovementioned hath made the Law of God to the Jews of prohibition of marriages the Law of
England.

England, But hath not made the particular Laws of God; for dispensation or allowance of marriages (as between the Heire's and the next of Kin : And the younger Brothers marrying the relict of the Elder Brother dying without issue, which were also the Laws of *Athens* and *Sparta*.) the Law of our Land : Such marriages are not allowable by our Law, but stand interdicted by the general prohibition of that Law, which is only made the Law of *England* under the notion of the Law of God.

We further therefore conclude, that a marriage within these prohibited degrees is no marriage.

Persons contracting marriage within these degrees are no more marry'd then two women or two men can be marry'd : A moral faculty to a moral Act is as necessary, as a natural ability to the producing a natural Act.

It was comprehended in the Question, whether a marriage was had in fact at common Law : whether it was a man marry'd to a woman, whether both persons were of sufficiency to make the contract : whether either of them precontracted or before that, marry'd ? for the Person precontracted or before marry'd had no power left over him or herself : Whether if by force or *Dolus malus* the marriage wanted consent : for then it was likewise no marriage : All these matters come into Issue upon the Question marry'd or not marry'd, and the truth of these matters are understood by proof or inspection as all other things of like nature are proved, and no religious Notices are requisite to instruct the Enquiry upon a Trial thereof had, and therefore was never of right proper for an Ecclesiastical Court. And now in like manner, if the Persons be not lawful, the marriage for that reason is null, and the Question is a Question of Fact now (*vizt.*) whether of kin or how a kin : not of Law (*vizt.*) whether Persons so a kin may marry an utter Disability in the

the Persons disabled, hinders the marriage to proceed, and there is now no Judgment of Discretion left to the Ecclesiastical Courts.

The common Law Courts had Knowledge of the Question whether marriage or not marriage, this cannot be denyed or brought in question with any colour or shadow of pretence. A man need not go into the Ecclesiastical Court to prove his marriage before he can sue for that Estate, or Person of his wife as he must to prove a will before he can sue as Executor, and any man may directly declare upon a right acquired to him by marriage of his Wife.

The Fact and Law in the case of marriages is now the same, and the distinction of marriage, and Legal marriage is taken away.

The question is now single, whether marriage or not marriage, and therefore cannot be divided into two cognizances: And this belongs solely to the temporal Courts, for that the Ecclesiastical Court cannot allow of what the temporal Law hath declared to be contrary to the Law of God. Nor can they have consueance of a statute Law, they cannot impeach any marriage that our Statute saith shall not be impeached; and whether it ought to be impeached or no, whether within the Statute or no, they are by no means to judge. Our Judges issue out writs of mandamus to the Ecclesiastical Courts, to require them to separate and punish Persons, making marriages by our Law incestuous and void, as well as we prohibit them, if they disquiet any marriage by our Law made lawful in which our Judges interpret, declare and resolve uncontrollably: The Ecclesiastical Courts can neither bind nor loose judicially, and therefore can have no judicial Authority.

And

And therefore I conceive the *Ecclesiastical* Courts exceed their Jurisdictions, as it is now restrain'd in consequence of these *Statutes*; if they bring any *Marriage* into question in that Court; and ought to be Prohibited, since, that the question of Right and Law (which was proper for them, when they gave the Rule of the Lawfulness and unlawfulness of the Degrees) is now become a question of Fact, and is Cognoscible in our Common-Law-Courts.

A *Marriage* Try'd at Law, is not contrrollable by the Authority of the *Curia Christianitatis*: And where there hath been a Tryal at Law in affirmation of a *Marriage*, the *Ecclesiastical* Courts interposings for that reason the rather ought to be Prohibited.

By the aforementioned Laws, all *Marriages* made within the Levitical degrees are *ipso jure null*, and void and indispensable by any *Ecclesiastical* Authority: And *Marriages* without the Levitical Degrees by the *Ecclesiastical* Courts, are not Impeachable. No process Plea, or Allegation is to be allowed in any *Ecclesiastical* Court, to trouble or impeach such *Marriages*.

Therefore it is no Objection, or Argument, that the *Ecclesiastical* Courts, notwithstanding have still Cognizance of Matrimonial Causes. For that Consultations are granted upon Prohibitions, when the *Marriage* is made between Persons not Lawful, and within the Levitical Degrees. For in such cases, those Courts have no Power of Judgment or Discretion. They do not Annul such *Marriages* by their definitive Sentence: For they are (by our Law) no *Marriages*, and void; and made *null* to their Hands; and whether they will or no. A Consultation in such Causes, is but a softer word for an Injunction or Mandat to Separate the Persons, and Punish them by the Censures of the Church, as in-

estuous; which if they do not do upon a Consultation, they will be peremptorily Enjoyn'd to do by the Authority of the *King's Court*.

Sir *John Vaughan*, would have Matrimonial Causes to be still of *Ecclesiastical Cognizance*, read pag. 320.

First, For that some *Marriages* are allowed to be unlawful by *Goa's Law*, which are not within the Levitical Degrees: And from thence would infer, That there remains a Judgment and Authority in the *Ecclesiastical Courts* in Matrimonial Causes; and that the definitive Authority of the *Church of Marriages* Lawful or unlawful, is not extinguished by the aforementioned Statutes.

His instances to prove this, are these, (*viz.*) A *Marriage* made with a Person Precontracted, or with a Person naturally Impotent: These *Marriages* he saith, are against *Goa's Law*; yet they are not *Marriages* within the Levitical Degrees.

But all the World hath taken such *Marriages* to be no *Marriages*; and therefore not unlawful *Marriages*: And the matter of impotency or percontract, makes a *Marriage* none in fact, and enquirable in an Issue at Common-Law, whether *Married* or not *Married*.

His *Second Reason* is, For that *Canons* may be made by the Authority of the *Church*, to make other *Marriages*, which are not within the Levitical Degrees, unlawful. A Lawful *Canon* is the Law of the Kingdom, as well as an Act of Parliament. This is a great Paradox indeed, that *Canons* are Laws, that they can controul Laws. That a *Parliament* can give away the Legislative Authority, and impower any Synod or Convocation, to Abrogate their Laws.

Thirdly, He makes an Arbitrary distinction between a *Marriage* within the Levitical Degrees, and a *Marriage*

riage within the Levitical Prohibition: And would have more *Marriages* within the Degrees, than are the *Marriages* Prohibited; and consequently some Matrimonial Causes still remaining to the Judgment of the *Ecclesiastical* Courts.

And this he proves from an Instance of the Wives Sister, which is within the Degrees, he saith, but not Prohibited in all cases, he thinks, because it is Prohibited to *Marry* her, during his Wives Life, but doubted if Lawful after her Death.

But this doubt is put to an end, by 25. *H. 8.* as is before recited, which declares it to be Prohibited by God's Law, and indispensable, and the Persons to be Separated.

These Reasonings of a great Man, as Sir *John Vaughan* truly was, are a remarkable instance, how tempting great Men are to assume, speak things *Gratiis*, and affect to be *super-fine*, *Heterodox*, and *Sceptical*.

True it is, after this restraint of *Marriage* limited by our Laws, The *Church* by her *Canons* may use her Authority to bring into dislike, discommend, and disswade other *Marriages* that are by our Law allowed, and are not to be Impeach'd by the *Ecclesiastical* Courts; and by this means *Marriages* so disswaded, may at length be brought into disreputation, and general dislike; and come in time to be made unlawful. But the observance of such *Canons* cannot be enjoyn'd under the incurring of *Church-Censures*, and by a judical coercion of the *Ecclesiastical* Authority: to affect which ignominy, belongs to the Law and Civil Authority. *Infamie quoque irrogatio pars est Gladii*, saith *Grotius*, in his Book *de jure Summarum potestatum circa sacra*.

But most commendable it is to lay Restraints upon our selves for the sake of Virtue, where the Laws have

left us at liberty, In the time when the *Christians* observed *Moses* Law; that of *Justin Martyr* was verified in their Practises;

Πισχεται τοις κυριουσ ρημασι, καὶ τοις ιδιουσ βίαις νικῶσι τοὺς ρημασι.

They obey the Laws, and in their Lives are better than the Laws require: And if any Man will, for the regard to the virtue of Chastity, abstain from a *Marriage* of a *Cosin German*, or any other near of Kin to him; and therefore forgoe any advantage; it ought to be imputed to him, as a worthy instance of Virtue, and very Commendable: But *God* hath made no positive Law to inhibit them. Our Laws have not forbidden them; and Nature hath yet made no Law to prohibit and restrain them: For Nature, as well as Politics, makes Laws upon Emergent Mischiefs, and great Inconveniencies, that do arise from the use of Natural Liberty, were the first permission was innocent; but whatever is not the best, and whatever is not very convenient, is not enjoin'd as a Law under the sanction of an evil Conscience.

The Laws of Nature are the directions of Reason for avoiding Mischiefs, or obtaining some important Good to the generality of Mankind; and direct us where Laws do not command. *Latius patet officiorum quam Juris regula. Quod non vetat lex hoc vetat fieri pudor.*

But he that is not a Law to himself from his slow Apprehension, and dull Capacity, is Governed only by Penalty, and the sharp Restraints of Law. The Law of Nature is no more to be measured by the understandings and Consciences of some Men, than it is to be defin'd by the propensions and actings of beasts.

Neither are the Laws of Nature to be numbred, for they are as many as the various Applications of Reason to the emergent Cases; and there is no end of her legislative Authority. Men

Men of refined Senses do soonest apprehend these inconveniencies, which render things by the the direction of humane Nature or Reason unlawful; and by their Authority first, and after that, by the concurrent Sense of inferiour Men, that at length reflect, they are noted of great inconvenience and mischief: Become at length detestable, and in process of time an aversion and loathing is begot in the lowest order of Men to transgress them. Whatsoever, by a general Opinion, is made infamous, from the regard that every Man hath to his own Esteem by Nature, he is oblig'd to shun and avoid. And if any thing to which we are not under an obligation to observe from a declared Will of God, be thus, by general Opinion, rendred infamous; we are bound by the Law of Modesty to refrain from it, who is a severe Avenger of any Transgression committed against Her: There is not a more oppressive and afflictive Passion, than that of shame and dejection of Mind; the most bitter ingredient in remorse of Conscience.

Nature did not make all her Laws at first.

This the *Jews* express inartificially, when they say, That *God* gave *Adam* a Law in the Beginning, against Brothers *Marrying* their Sisters; but *God* dispens'd with it for the Peopling of the World, and deriving all Mankind from one Stock.

Nothing becomes a Law of *God* in our Nature and Consciences, before it is behoof-ful to have it observed; and hurtful to have it neglected. It was no more a Law to *Adam's* Sons, not to *Marry* their Sisters, for the preventing early Lust and disorder in Families, than it was a Law to *Adam*, not to *Steal*; or to *Eve*, not to *commit Adultery*: When there was no Lord, or Proprietor in the World but himself; and no Man besides *Adam* in the World.

For

For that a matter at some time may be Lawful; and for avoiding mischief and inconveniency, may, in after time, become unlawful and prohibited: Will assail that doubt how it comes about, That several of the *Marriages* prohibited in *Leviticus*, were used by the best of Men, whose Story is Recorded by *Moses* before the Law: As *Abraham's* Marrying *Sarah* his Sister by the Father: *Amram*, *Moses* his Father Marrying *Jochabed*, his Fathers Sister, &c.

The *Mosaical* Law was added, because of Transgression.

By reason of such *Marriages* at that time, by no Law forbidden, Mankind had corrupted themselves: It was fit therefore, that by a Law, a Restraint should be made of those Licences, that in the whole complication of them, had depraved humane Nature with incessant Lust, and engaged them more frequently in those desires, which became (by the permission of Persons of the nearest Kindred of every days Conversation, to be a Lawful Object of Love, and an allowed person for *Marriage*) most hurtful by their importunity.

So great a Mischief this permission had wrought, and such a Corruption, if manners in the *Canaanites* that they had proceeded from the incestuous and inconvenient *Marriages* upon the Reason aforesaid, to nefarious Mixtures; nay, to mingle with Beasts, and to invert the Order of Nature: And for these Abominations they came to be destroy'd, the Land was defiled, and was now to Vomit forth the Inhabitants, *Levit. 18. v. 27.* There needs not that Niceness that great Criticks have used to restrain the word Abominations, to nefarious and unnatural Mixtures: Who think it not Allowable, that the term *Abominations*, *Levit. 18. v. 27.* be applyed to the incestuous *Marriages* at that time forbidden to the *Jews*. But even these *Marriages*, by reason

son of the Corruption and Debauchery of manners they had occasion; and those more horrid Abominations that followed in Consequence of these Marriages. I think, for these Reasons, even these Marriages were now become Abominable.

Most necessary it is to preserve Men in any degree good and virtuous, and useful to any good purposes: That they should, in ordinary Conversation, be respected from Lust and Amours, and be enjoyn'd great vacancies from those impure desires: That they should not every where, where-ever they go, find an Object to solicit them. That the innocent Friendship of Families, and Kindreds, should be preserved pure and untainted, which Ministers the truest pleasure and satisfactions of Life; and by no means become an invitation to Lust, that is apt to waste and utterly Destroy them. That Families should not be incessantly haunted, possessed, and cursed by Lust, and Rage two Devils that are never divided, and are inseparable associates. By permission of Marriages, in such degrees, Families are apt to be turn'd into Styes of unclean Beasts. And Men to be engag'd and plung'd in such desires, and wholly Govern'd by them, so as to be made *Mentule lacinia* as *petronius Arbiter* sharply pronounc'd of the Sparks of that Age. And a great part of mankind easily turn'd into a falacious sort of Virmin, good for nothing (if for that) but to propagate their own unworthyness: fit to be destroyed by divine Vengeance, for recovering the humane Nature from Perdition.

I have but one thing more to observe about this Law, which will make out the Rationale of it; which some great Men have thought inexplicable: and that is the admirable Wisdom, and Divinity in the Structure of it.

That which this Law designs to promote, is made the

the inducement of the Law. But this which becomes the inducement, the Law it self inculcates and teacheth: The Law it self introduceth such an understanding in the Minds of the people, as makes the things that it forbids by the very propounding of them, fit for aver-sation. It at once improves natural Modesty, and sets a Fence about it, by strict prohibitions and penalties. For it calls those Enjoyments the *Nakedness* of the Man and Woman, *i. e.* their *Shame*; and so makes them the object of the *Natural pudor*. It teacheth us to reverence our Relations: And out of respect and good manners, we are not to cast our Thoughts no more than our Eyes upon those Enjoyments which they are taught by this Law to Blush at, if seen and detected. These are privacies that we must not enter with our Thoughts. Acts that are to be done alone, and will admit no participants; no not in Succession, if we value our selves (for we ought to maintain a respect to our selves, for the supporting the order of the World, and a reverence is therefore due to our inferiours, *Maxima etiam pueris debetur reverentia*) or respect those Relatives which we ought to reverence: For this Law in the sence of it instructs us, that they are lessen'd when remembred by them. By this Law, and the frame of it, all obscene talk and filthy communication is more than interdicted; for those that are instructed by this Law, and are under the reason of it, must even abhor such Communica-tions, as they do exposing their own Nakedness.

sir, Thus I have performed your desires, as I could in that shortness of time you allowed me: What is done in obedience to your Command, cannot fail of your Acceptance.

Farewel.